STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs **Michigan Supreme Court No. ******

JOEL EUSEVIO DAVIS,
Defendant-Appellee.

Court of Appeals No.	**332081**
Circuit Court No.	**15-005481-01-FH**

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED AND RELIEF SOUGHT

The People apply for leave to appeal the July 13, 2017 published opinion of the Court of Appeals vacating defendant's conviction of one count of aggravated domestic assault.[1] As set forth below, this Court must grant relief because: (1) the issue here "involves a legal principle of major significance to the state's jurisprudence;" (2) "the decision conflicts with a Supreme Court decision;" and (3) the decision of the Court of Appeals is "clearly erroneous and will cause a material injustice." MCR 7.305(B)(3), (5)(a)-(b).

Defendant Joel Davis was convicted by jury of assault with intent to do great bodily harm less than murder (MCL 750.84) and aggravated domestic assault (MCL 750.81a) for assaulting his live-in girlfriend, Shawna Shelton. In his appeal of right,[2] defendant argued that his convictions offended double jeopardy because the crimes contain statutorily opposing mental states: that is, a person is guilty of violating MCL 750.84(1)(a) if he assaults *with the intent to do great bodily harm*, while a person is guilty of violating MCL 750.81a if he assaults a domestic partner "without a weapon and inflicts serious aggravated injury upon that individual *without intending to…inflict great bodily harm less than murder*." MCL 750.81a(2) (emphasis added). In their answer to defendant's brief on appeal, the People disagreed that defendant's convictions offended double jeopardy, writing that "[b]ecause the crimes have different elements, 'these

[1] This Court has jurisdiction over the People's application for leave to appeal from the Court of Appeals' July 13, 2017 opinion—attached to this brief as the People's Appendix A—pursuant to MCR 7.303(B)(1). The People's application is timely filed pursuant to MCR 7.305(C)(2)(a).

[2] Defendant also argued on appeal that the trial court erred when it admitted certain photographs. of the victim wearing a neck brace in the hospital after defendant assaulted her. The Court of Appeals denied any relief on that claim of error and that issue is not relevant to the arguments made by the People in this application. Defendant's brief on appeal is attached to this application as the People's Appendix B.

offenses are not the 'same offense' under either the Fifth Amendment or Const. 1963, art 1., §15 and therefore defendant may be punished separately for each offense.'"[3]

In a published opinion, the Court of Appeals agreed that defendant's convictions did not violate double jeopardy. But instead of ending its analysis there—denying, for lack of merit, the claim of error defendant chose to raise on appeal—the Court of Appeals stated that "the issue [was] more nuanced than expressed by the defense[,]" and then proceeded to examine defendant's convictions under the lens of inconsistent jury verdicts, an issue not raised by defendant or briefed by the parties. *People v Davis*, __ NW2d __, *2-3; 2017 WL 2988849 (2017). After concluding that "[t]his case does not fit the mold of inconsistent-verdict jurisprudence[,]" the court looked to case law from Washington DC, Georgia, and Tennessee and declared that MCL 750.84 and MCL 750.81a are "mutually exclusive" statutes, because the crimes require inherently contradictory mental states. *Id.* at *2. The error in this case, the Court of Appeals opined, stemmed from two sources: first, because the statutes are "mutually exclusive," the People erred by charging defendant with both crimes. Second, once the trial court received a "mutually exclusive verdict," it should have *sua sponte* vacated defendant's conviction for the lesser offense. The Court of Appeals then announced that it would "remedy" the error by vacating defendant's conviction for aggravated domestic assault. But not only did the Court of Appeals "correct" an error that does not exist, its published opinion now jeopardizes innumerable lawfully obtained convictions secured by prosecutors throughout this state against perpetrators of aggravated abuse against domestic partners.

[3] See People's Appendix C, plaintiff-appellee's brief on appeal, at page 13, quoting *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007).

First, the Court of Appeals erred in its reading of MCL 750.81a when it determined that a person can only violate this statute if he acts *without* the intent to do great bodily harm less than murder. Over thirty years ago in the case of *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979), this Court engaged in an analysis of a similar statute and held that comparable language was meant only to *distinguish* one crime from another—this so-called "negative element" was not an additional element that the People were required to prove beyond a reasonable doubt at trial. Here, by failing to properly understand and interpret *Doss*, the Court of Appeals effectively upended decades of precedent by sanctioning a completely contradictory statutory analysis, one which would functionally require a prosecutor to prove a negative in order to charge or convict a defendant at trial. Moreover, the court's incongruous reading of the statutes involved in this case has far-reaching implications. Many crimes in our penal code—such as MCL 750.82 (felonious assault), MCL 750.414 (unauthorized use of motor vehicle), MCL 750.329 (intentional discharge of a firearm causing death)—facially contain "negative elements" that, pursuant to *Doss*, are not elements of the offenses that prosecutors must prove at trial. Going forward, if trial courts were to follow the Court of Appeals' explanation on how to interpret these statutes, juries will be misinstructed to find elements of offenses that do not exist, or, as posited by *Davis*, trial judges will improperly vacate convictions obtained after jury or bench trial, despite the fact that the prosecutor would have met their burden of proving defendant's guilt beyond a reasonable doubt.

Second, by wrongly declaring that MCL 750.84 and MCL 750.81a are mutually exclusive offenses—and asserting that the prosecutor erred by charging defendant with committing both crimes—the Court of Appeals created a material injustice not only in this case, but in scores of others throughout the state. First, when the court vacated defendant's conviction for aggravated domestic assault for an unsound legal reason, it denied justice to the victim here,

who courageously faced her abuser in open court. Second, prosecutors statewide have now been instructed that they cannot charge defendants who assault and injure their "spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has a child in common, or a resident or former resident of the same household"[4] with aggravated domestic assault if the prosecutor also wishes to charge the crimes of assault with intent to do great bodily harm less than murder or assault with intent to murder. Tying the hands of prosecutors seeking justice on the behalf of victims—for an erroneous legal reason—cannot be allowed to stand. Third, the People foresee an avalanche of post-conviction motions citing the Court of Appeals' decision in *Davis* as grounds for defendants convicted of like crimes to vacate an otherwise lawfully obtained conviction. In fact, this latter point has already been proven true by way of an application for leave to appeal currently pending before this Court. See *People v Dorian Lamarr Price* (MSC No. 156180; COA No. 330710);[5] see also *People v Theodore Wafer* (MSC No. 153828; COA No. 324018).[6]

This Court must address this issue and remedy the Court of Appeals' error. The issue involves legal principles of major significance to the state's jurisprudence, the Court of Appeals' decision conflicts with a decision of this Court, and the Court of Appeals' opinion is clearly erroneous and will cause—and has already caused—a material injustice. The People request this Court either grant the People's application or peremptorily reverse the Court of Appeals.

[4] MCL 750.81a(2).
[5] See the People's Appendix D, defendant-appellant Dorian Lamarr Price's application for leave to appeal.
[6] See the People's Appendix E, defendant-appellant Theodore Wafer's supplemental authority to defendant's application for leave to appeal.

STATEMENT OF QUESTION PRESENTED

I

Offenses are mutually exclusive when a guilty verdict on one offense necessarily excludes a finding of guilt on another. Here, after defendant repeatedly assaulted the victim, he was charged with and convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault, crimes which are comprised of different elements, including distinct mental states. Because defendant's convictions were not mutually exclusive, did the Court of Appeals reversibly err when it found to the contrary?

The People answer, "Yes."

Defendant would answer, "No."

The circuit court was not asked this question.

The Court of Appeals would answer, "No."

STATEMENT OF FACTS

This case arises from defendant, Joel Davis', conviction by jury of assault with intent to do great bodily harm less than murder[7] and aggravated domestic assault.[8] The facts are as follows:

At around 4:00 a.m. on June 10, 2015, 29-year-old Shawna Shelton lay sleeping in bed when defendant, her live-in boyfriend, suddenly burst into the room and asked where the ashtray was.[9] Shelton, who avoided making eye contact with defendant, responded that she did not know. Defendant began yelling that Shelton was being disrespectful by not looking at him, grabbed her shirt, and yanked her off of the bed and "threw" her onto the floor. Defendant hit Shelton—hard—two or three times in the face and head while she yelled at him to stop.[10] The force of the physical assault was such that Shelton later testified that she had "never felt that much pain" before.[11]

Shelton got up and ran into the nearby living room, whereupon defendant charged her and hit her "very hard" two times in the face. Shelton felt blood "draining" after defendant hit her nose, felt her mouth filling with blood, and could not see out of her left eye, which had swollen shut.[12] Shelton screamed for defendant to stop hitting her and yelled for help.[13] Defendant yelled at Shelton to shut up, telling her that she was going to make him have to kill

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[7] MCL 750.84.
[8] MCL 750.81a(3).
[9] Transcripts are cited throughout this brief as follows: month/day of proceeding, page number. 02/16, 148-150.
[10] 02/16, 151-152.
[11] 02/16, 152.
[12] 02/16, 153-154.
[13] 02/16, 199-200.

her.[14] Shelton, who stood only 5'1 compared to defendant, who was 6'2 or taller, was scared for her life.[15]

After defendant calmed down, Shelton ran to the bathroom, opened her mouth, and saw blood come out. When Shelton exited the bathroom, defendant was gone, as was her 2001 black Jeep Cherokee, which she had not given him permission to take. Missing from Shelton's purse were her cellular telephone, $400.00 in cash, and her keys.[16] Shelton put on a clean shirt and knocked on the doors of multiple neighbors until she found one willing to allow her to use the telephone to call the police.[17]

Officer Jordan Dotter of the Dearborn Heights Police Department responded to the area and came into contact with Shelton, who was still bleeding, and observed her extensive injuries: her "face was almost unrecognizable," both of her "eyes were swelled almost shut," "[h]er lip was severely swollen, and she had a pretty significant bruise on her nose."[18] An evidence technician took photographs of Shelton's "significant" injuries,[19] and then Officer Dotter escorted Shelton back to her house.[20] Although EMS offered to take Shelton to the hospital, she initially declined because she wanted to leave the area since she did not know where defendant had gone to.[21] Instead, Shelton went to the police station, where she was later picked up by her mother who took her directly to Southshore Hospital's emergency room. Once at the hospital, Shelton had a CAT scan and x-rays done, was given pain medication, and was put in a neck

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[14] 02/16, 153-154.
[15] 02/16, 155.
[16] 02/16, 156-157.
[17] 02/16, 159.
[18] 02/16, 204.
[19] 02/17, 9 (Sergeant Gary Voiles testifying that it appeared to him that Shelton had been "severely beaten about the face.").
[20] 02/16, 205.
[21] 02/16, 167, 207.

brace, which a doctor told her to continue to wear even after she left the hospital. Following the assault, Shelton reported suffering from "extreme pain" in her neck, face, and head.[22]

On June 12, 2015, defendant stood mute at the arraignment on the warrant on the charge of aggravated domestic assault. On July 1, 2015, following the preliminary examination, defendant was bound over for trial on that charge, along with the additional charges of assault with intent to do great bodily harm less than murder, unlawful driving away of a motor vehicle,[23] and larceny of personal property $200.00 to $1,000.00.[24]

On July 8, 2015, defendant stood mute at the arraignment on the information and a not guilty plea was entered on his behalf.[25] The following year, after a two-day jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault.[26] On March 9, 2016, the court ordered defendant to serve an above-the-guidelines sentence of 69 months to 10 years of imprisonment in the Michigan Department of Corrections for the crime of assault with intent to do great bodily harm less than murder, to be served concurrently with a sentence of 1 to 5 years of imprisonment for the crime of aggravated domestic assault.[27]

On March 21, 2016, defendant filed a claim of appeal in the Court of Appeals. On November 28, 2016, defendant filed his brief on appeal, contending that he was entitled to have his convictions vacated, because: (1) the trial court abused its discretion when it allowed the People to admit, at trial, two photographs of the victim wearing a neck brace; and (2) since the

[22] 02/16, 168-169.
[23] MCL 750.413.
[24] MCL 750.356(4)(a); 07/01, 30.
[25] 07/08, 3.
[26] The jury acquitted defendant of the remaining charges. 02/17, 120-121.
[27] 03/09, 21-23.

crimes of assault with intent to do great bodily harm less than murder and aggravated domestic assault contain conflicting mental states, his convictions for both offenses offended double jeopardy.[28]

On June 14, 2017, the People filed their brief on appeal, contending: (1) that the court had not abused its discretion when it allowed the admission of relevant, probative, photographs of the injured victim at trial; and (2) that, under the *Blockburger*[29] "same elements" test, defendant's convictions did not implicate double jeopardy.[30] As part of their second argument section, the People made the following observation in a footnote:

> To the extent that defendant intimates that he is entitled to relief because the jury's verdict was inconsistent, that issue is not properly before this Court because it was not raised in defendant's statement of the questions involved. MCR 7.212(C)(5). And if that is, in fact, an argument defendant desired to pursue on appeal, he completely failed to brief it for this Court. "A party who seeks to raise an issue on appeal but who fails to brief it may properly be considered to have abandoned the issue." *People v Smith*, 439 Mich 954; 480 NW2d 908 (1992), citing *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). This Court must decline to address this veiled argument for that reason. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999) (refusing to consider the defendant's constitutional claim that he failed to present in his statement of questions presented). Nonetheless, it is well-recognized that inconsistent verdicts within a single jury trial do not require reversal. *People v Vaughn*, 409 Mich 463, 466-467; 295 NW2d 354 (1980) ("Juries are not held to any rules of logic nor are they required to explain their decisions). And, in any case, the People disagree that the verdicts in this case were inconsistent: an intent to inflict great bodily harm less than murder merely *distinguishes* the two crimes defendant was convicted of here; it does not prevent the jury from convicting defendant of both offenses. See, e.g., *Doss*, 406 Mich at 99.[31]

[28] See People's Appendix B.
[29] *Blockburger v United States*, 284 US 299; 52 SCt 180; 76 LEd2d 306 (1932).
[30] See People's Appendix C.
[31] See Appendix C at page 11, footnote 35.

On July 13, 2017, the Court of Appeals issued a published per curiam opinion finding defendant's arguments regarding the admission of certain photographs at trial to be "meritless."[32] *Davis*, __ NW2d at *1. But the Court reframed defendant's second issue on appeal, stating: "We agree that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions. However, the issue is more nuanced than expressed by the defense and double jeopardy is not the proper initial focus." *Id.* at *2. The Court then looked at Michigan jurisprudence regarding inconsistent jury verdicts, but concluded that the instant case did not fit within the confines of that legal analysis. After looking to case law from outside this state, the Court held that defendant's convictions were such that "a guilty verdict on one count necessarily excludes a finding of guilt on another, rendering the two 'mutually exclusive.'" *Id.* at *4 (quotation and citation omitted). Due to the "error" of defendant being convicted of two mutually exclusive offenses, the Court vacated his conviction for aggravated domestic assault.

The People now apply for leave from the Court of Appeals' decision.

[32] See People's Appendix A.

ARGUMENT

I.

Offenses are mutually exclusive when a guilty verdict on one offense necessarily excludes a finding of guilt on another. Here, after defendant repeatedly assaulted the victim, he was charged with and convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault, crimes which are comprised of different elements, including distinct mental states. Defendant's convictions were not mutually exclusive and the Court of Appeals reversibly erred when it found to the contrary.

Standard of Review

Preserved questions of statutory interpretation are reviewed de novo as a question of law. *Parise v Detroit Entertainment, LLC.*, 295 Mich App 25, 27; 811 NW2d 98 (2011).

The People bring the question of issue preservation to this Court's attention. The People dispute any contention that the issue before this Court has been properly preserved for appellate review. As discussed above, defendant never argued in the trial court or in his direct appeal that he was entitled to relief because he had been convicted of mutually exclusive offenses. Instead, defendant argued on appeal that his convictions should be vacated because of a double jeopardy violation[33] and this is the issue the People responded to in their brief on appeal. In their opinion, however, the Court of Appeals determined that "the issue is more nuanced than expressed by the defense" and that double jeopardy was "not the proper initial focus." *Davis*, __ NW2d at *2. The court went on to hold "that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions[,]" an issue that had been neither raised nor briefed by either party.

[33] Defendant failed to preserve the double jeopardy argument by raising it in the trial court. "Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review." *Michigan Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 167; 533 NW2d 339 (1995) (citing references omitted).

This Court "has long recognized the importance of preserving issues for appellate review" and "disfavors consideration of unpreserved claims of error." *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. As to the second element, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett v United States*, 556 US 129, 135; 129 SCt 1423; 173 LEd2d 266 (2009). An error is plain "where a trial court's ruling contravenes clearly established precedent." *United States v Brown*, 352 F3d 654, 665 n 10 (2003). In the rare case, "[e]rror is plain if it is so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *Id.* at 664-665 (internal quotation and citation omitted).

Here, the Court of Appeals *sua sponte* raised the issue it granted defendant relief on, failed to give meaning to this Court's decision in *People v Doss*, and created new law by relying upon out-of-state authority in order to reach its conclusion. Accordingly, the "error" identified by the Court of Appeals was anything other than plain.

Discussion

The Court of Appeals' finding—that the crimes of assault with intent to do great bodily harm less than murder and aggravated domestic assault are statutorily "mutually exclusive" offenses—is completely erroneous, and it is upon this rotten foundation that the rest of the opinion's analysis, determinations of the sources of error, and proffered remedy lies. Justice requires this Court to reverse and reinstate defendant's conviction for aggravated domestic assault.

A. The Court of Appeals erred when it determined that the crimes of assault with intent to do great bodily harm less than murder and aggravated domestic assault require statutorily mutually exclusive mental states.

Following a two-day jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault, crimes which are defined respectively by statute as follows:

> MCL 750.84(1): A person who does…the following is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both: (a) Assaults another person *with intent to do great bodily harm*, less than the crime of murder."[34]
>
> MCL 750.81a(2): Except as provided in [MCL 750.81a(3)], an individual who assaults his or her spouse or former spouse, an individual with whom he or she has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder* is guilty of a misdemeanor[.][35]

The Court of Appeals reviewed these two statutes and declared: "[c]learly, these two statutes are mutually exclusive from a legislative standpoint." *Davis*, __ NW2d at *2. This is so, the court reasoned, because it had to "give effect to the plain and unambiguous language selected by the Legislature. And the plain language of the statutes reveals that a defendant cannot violate both statutes with one act as he or she cannot both intend and yet *not* intend to do great bodily harm less than murder." *Id.* (internal citation omitted, emphasis in the original). The court, however, was flat-out wrong in its analysis of MCL 750.84 and MCL 750.81a. The mental state described in MCL 750.81a(2)—"without intending to commit murder or to inflict great bodily harm less than murder"—is merely a descriptor which indicates that no greater intent is needed to prove the crime; it does not provide that a defendant with a more malevolent intent should be found not

[34] MCL 750.84(1)(a) (emphasis added).
[35] MCL 750.81a(2) (emphasis added).

guilty. This language of limitation does not create a burden on the People to disprove at trial that defendant did not have the stated intent.

In *People v Doss*, 406 Mich 90, this Court engaged in a comparable analysis of the crime of manslaughter, which was defined by statute as follows: "Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally *but without malice*, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter." *Id.* at 97, quoting MCL 750.329 (emphasis added). The Court then examined whether the absence of malice was an essential element of the crime of manslaughter. In holding that the term "'without malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt[,]" the Court explained: "[w]hile the absence of malice is fundamental to manslaughter in a general definition sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt." *Id*. at 99. Accordingly, "[t]he elements of statutory manslaughter are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the death resulted from the discharge of a firearm, (4) at the time of the discharge, the defendant was intentionally pointing the firearm at the victim, and (5) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007) (citing reference omitted).

Here, the Court of Appeals briefly examined *Doss*, agreed that MCL 750.81a contains a "negative element," just like the manslaughter statute, and affirmed that—in order for the jury to convict defendant of aggravated domestic assault—the People were not required to prove that

defendant lacked the intent to commit great bodily harm less than murder.[36] Nonetheless, the Court concluded that "[t]his [did] not nullify the error of convicting defendant of mutually exclusive offenses[.]" This circular reasoning does not square. The offenses are not mutually exclusive because the People are not required to prove at trial that defendant acted without the intent to do great bodily harm less than murder.

The mistake made by the Court of Appeals in this case is nothing new. Courts in this state have long observed the confusion that results "from analysis which treats as positive elements of a crime" negative concepts that appear on the face of a statute. *People v Chamblis*, 395 Mich 408, 424; 236 NW2d 473 (1975), overturned in part on other grounds by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). For example, in *Chamblis*, this Court noted that, within the context of lesser-included offenses, the "unarmed" part of the crime of unarmed robbery "is not a distinct, separate element" because it refers merely to the absence of the element of the use of a weapon. *Id.* The Court went on to emphasize that "[e]lements are, by definition, positive. A negative element of a crime is a contradiction in terms." *Id.* Likewise, in *People v Crosby*, 82 Mich App 1; 266 NW2d 465 (1978), the Court of Appeals observed that, although the crime of unlawful use of an automobile, found in MCL 750.414, "uses the phrase 'without intent to steal[,]' [t]he absence of an intent to steal is not an element that the people must show beyond a reasonable doubt. This language merely indicates that the statute applies even though there is no intent to steal." *Id.* at 3.

[36] The Court of Appeals' conclusion is supported by the jury instruction for that offense: (1) an assault; (2) committed against a person who was a resident or former resident of the same household as defendant, or was a person with whom defendant had or previously had a dating relationship; and (3) that the assault caused serious or aggravated injury. See 02/16, 130-131; see also MCL 750.81a(2)-(3).

The Court of Appeals' reading of the two statutes involved in this case is further undermined when one of its proposed remedies to correct the "error" in this case is more closely examined: that after the jury returned its verdicts, the trial court "should have…reinstructed the jury to elect conviction under one or the other" offenses. *Davis*, __ NW2d at *5. The Court of Appeals' opinion does not explain what kind of additional instruction the trial court should have given to the jury in this case, especially in light of the fact that the jury was properly instructed on the elements of each offense and, after deliberating, found defendant guilty beyond a reasonable doubt.[37] The opinion implies that what the trial court *should* do in cases such as this is send the jury back for further deliberations with the added instruction that the panel should choose between verdicts by considering the "negative element" present in the statutory definition of the crime of aggravated domestic assault, i.e. whether defendant acted "without" the intent to do great bodily harm less than murder. This remedy is completely contrary to this Court's holding in *Doss* and flies in the face of over thirty years of established precedent.

Finally, not only is all of the legal authority cited by the Court in support of its conclusion not binding, the cases are factually distinguishable. In *United States v Daigle*, 149 F Supp 409 (DC), aff'd per curiam, 101 US App DC 286; 248 F2d 608 (1957), the defendant was charged with the crimes of embezzlement and larceny. In finding that the offenses were mutually exclusive, the court explained that "[t]he guilty verdict on the embezzlement charge required a finding that the defendant initially lawfully possessed the funds; this finding 'negative[d]' a 'fact essential' to the second convicted offense—that the defendant initially unlawfully possessed the funds." *Davis*, __ NW2d at *4, quoting *Daigle*, 149 F Supp at 414. Two other cases relied upon

[37] See 02/17, 99-101 (elements of the offenses), 112 (parties expressing satisfaction with the court's instructions); 120-121 (verdict).

by the Court of Appeals, *Dumas v State*, 266 Ga 797; 471 SE2d 508 (1996) and *State v Davis*, 2013 Tenn Crim App LEXIS 431 (2013), dealt with like issues, as the courts in those cases determined that certain "essential elements" of the charged offenses could not be reconciled. But all three of these cases are plainly distinguishable from the facts of this case: because the jury was *not* required to find that defendant acted without the intent to do great bodily harm less than murder when it convicted him of aggravated domestic assault, it never made a finding that "negatived" a "fact essential" to the crime of assault with intent to do great bodily harm less than murder.

In sum, the Court of Appeals reversibly erred when it held that MCL 750.84 and MCL 750.81a are statutorily mutually exclusive offenses containing mutually exclusive mental states. The People, therefore, did not err in charging defendant with committing both offenses and the trial court did not err when it accepted the jury's verdict of guilty on both counts. Because the Court of Appeals vacated defendant's conviction for aggravated domestic assault for an erroneous legal reason, defendant's conviction must be reinstated.

B. Even assuming, in arguendo, that assault with intent to do great bodily harm less than murder and aggravated domestic assault contain mutually exclusive mental states, the offenses were not mutually exclusive in this case because defendant committed more than one assaultive act.

In its opinion, the Court of Appeals held that defendant should not have been charged with or convicted "for a *single act* under two statutes with contradictory and mutually exclusive provisions." *Davis*, __ NW2d at *2 (emphasis added). While the Court of Appeals did not define the term "single act," case law cited by the court in its opinion does discuss the meaning of this term. For example, in *Davis*, 2013 Tenn Crim App at 22, the court noted that "'[t]he rule against mutually exclusive verdicts applies only where the convictions result from the same act involving the same victim at the same instant. Where the victim sustains several injuries,

convictions for both intentional and negligent crimes are not mutually exclusive.'" *Id*. quoting *Waits v State*, 282 Ga 1, 3; 644 SE2d 127 (2007). That the term "single act" means the same conduct committed by the same defendant against the same victim at the same moment in time is also supported by the other cases referenced by the Court of Appeals. See *Daigle*, 149 FSupp at 414 (discussing the concept of mutually exclusive offenses in the context of a defendant charged with embezzlement and larceny stemming from the same financial transaction); *Dumas*, 266 GA at 797 (same, with respect to the charges of malice murder and vehicular homicide stemming from the death of one victim); *Davis*, 2013 Tenn Crim App at 19 (same, with respect to the charges of reckless homicide and second-degree murder stemming from the death of one victim). Accordingly, the People would agree that if defendant had committed only a single assaultive act and then was charged with and convicted of two crimes that contained mutually exclusive mental states, the conviction for both offenses would be improper.

But this case is completely different from all of the cases relied upon by the Court of Appeals, because it did not involve a single act committed by defendant at one moment in time. At trial, the victim testified that defendant woke her up in the middle of the night, "yanked" her out of bed, threw her to the floor, and hit her—hard—two or three times in the face and head.[38] The force of the physical assault was such that Shelton later testified that she had "never felt that much pain" before.[39] The victim got up and ran into the nearby living room, whereupon defendant charged her and hit her "very hard" two times in the face. The victim felt blood "draining" after defendant hit her nose, felt her mouth filling with blood, and could not see out of

[38] 02/16, 151-152.
[39] 02/16, 152.

her left eye, which had swollen shut.[40] The victim screamed for defendant to stop hitting her and yelled for help.[41] Defendant yelled at the victim to shut up, telling her that she was going to make him have to kill her.[42] The victim, who stood only 5'1 compared to defendant, who was 6'2 or taller, was scared for her life.[43] The prolonged assault left the victim with "[e]xtreme pain" in her neck, face, and head. Afterwards, the victim was ordered to wear a neck brace and experienced five seizures, which required her to go on medication.[44]

Despite the trial record, the Court of Appeals badly misconstrued the underlying facts of this case and summarized defendant's assault of the victim as follows:

> Defendant and SS were romantically involved and lived together in Dearborn Heights. At around 4:00 a.m. on June 10, 2015, defendant woke SS to ask her where their ashtray was. Defendant took offense at SS's displeasure over being roused. He pulled SS to the floor by her shirt collar and struck her about the face with his fist and open hand. SS begged defendant to stop, but he told her to "shut up" and threatened, "you're gonna make me have to kill you."[45]

As outlined above, this truncated summary of the facts does not fairly depict what happened between defendant and the victim in this case. Instead, the trial evidence demonstrated that the charges here stemmed from defendant engaging in a sustained assault of the victim during which he threw her onto the floor, hit her multiple times in the face and head, chased her into a different room when she tried to escape, and then hit her again repeatedly in the face while threatening her life.

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[40] 02/16, 153-154.
[41] 02/16, 199-200.
[42] 02/16, 153-154.
[43] 02/16, 155.
[44] 02/16, 169-170.
[45] *Davis*, __ NW2d at *1.

Accordingly, defendant plainly was not charged with—nor did he commit—only a single assaultive act against the victim. Thus, even assuming that MCL 750.84 and MCL 750.81a contain mutually exclusive mental states, the prosecutor acted well within her broad discretion when she charged defendant—for the numerous assaultive acts he perpetrated against the victim—with violating both statutes. See *People v Williams*, 186 Mich App 606, 609; 465 NW2d 376 (1990). Moreover, the jury, having heard all of the evidence admitted at trial, properly returned a verdict finding defendant guilty beyond a reasonable doubt of both offenses. The Court of Appeals erred when it vacated defendant's conviction for aggravated domestic assault and must be reversed.

RELIEF

THEREFORE, the People request that this Honorable Court either grant leave to appeal or peremptorily reverse the Court of Appeals' decision and reinstate defendant's conviction for aggravated domestic assault.

Respectfully submitted,

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